

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1167 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and  
MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed  
to see the judgements? No.

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2. To be referred to the Reporter or not? No.

3. Whether Their Lordships wish to see the fair copy  
of the judgement? No.

4. Whether this case involves a substantial question  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?  
No.

5. Whether it is to be circulated to the Civil Judge?  
No.

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MAHEBUBKHAN SABDALKHAN PATHAN

Versus

STATE OF GUJARAT

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Appearance:

MS BANNA S DUTTA for the appellant.

MR BD DESAI, APP for the Respondent .

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CORAM : MR.JUSTICE K.R.VYAS and

MR.JUSTICE A.M.KAPADIA

Date of decision: 19/02/99

ORAL JUDGEMENT

PER: K.R.VYAS,J

The appellant has approached this Court by way of this appeal challenging the judgment and order of conviction and sentence passed in Sessions Case No. 234 of 1992 by the learned Additional City Sessions Judge, Ahmedabad convicting the appellant for the offence punishable under Section 20 (B) (ii) of the Narcotic Drugs & Psychotropic Substances Act, 1985 ( hereinafter referred to as "the NDPS Act") and Section 66 (1) (b) of the Bombay Prohibition Act and sentencing him to suffer R.I. for ten years and to pay a fine of Rs.1 lac in default to undergo further R.I. for one year for the offence under Section 20(B) (ii). No order of separate sentence for the offence punishable under section 66 (1)(b) of the Bombay Police Act has been passed. Besides the appellant, there were two other accused who were charged for the offence punishable under Section 29 of the NDPS Act., However, they were acquitted .

Pratapsinh Udesinh Raol PW 1, Ex.10) , Police Inspector, CID, Crime Branch, Ahmedabad, on 26-3-92 at about 10.00 a.m. received an information that the appellant is selling charas in a hut having gunny-bag roof situated on the footpath at Kot-ni-Rang near Asarva Railway Yard. Thereafter he got this information confirmed by sending his man and on being satisfied about the substance in the said information, immediately called two Panchas viz Vechatji Rajaji Thakor (PW 2, Ex.14) and Papubhai Madarbhai (PW 3, Ex.15) in his office and informed them about the raid to be carried out and thereafter explained PSIs Gohil, Shaikh, HCs Chavda and Gadhi PI Raol and his other staff members and went to the place of appellant in a Government vehicle and a scooter.

The appellant was sitting on a cot inside the hut and Kanubhai (original accused No.2 ) and Ashok ( original accused No.3) were sitting near the cot. After inquiring about the names of the accused, the raiding party expressed its desire to search their persons. However, before doing so, an option was given to the accused to search the persons of the members of the raiding party and the Panchas to which the accused declined. On the search being carried out of the person of the appellant-accused No.1, currency notes valued at Rs.582/-, a smoking pipe bearing smell of tobacco and charas were recovered from the pocket of his shirt and a polythelene bag bearing the label, "lion tea" was recovered from his right hand side pant-pocket. From the polythelene bag 140 tablets having silver arc were found. There was one ressin packet lying on the cot on which the

appellant was sitting. The raiding party opened it and found the same containing three polythelene bags respectively, containing 15 lumps, 72 lumps and 108 lumps of charas. The raiding party weighed the same and found that it was in all 765 grams.

On the search of the person of Ashok (original accused No.3) being made, the raiding party found currency notes valued at Rs.135/- and a smoking pipe containing the smell of tobacco and charas. Similarly from the person of Kanubhai (original accused No.2) a piece of white cloth and a smoking pipe containing smell of tobacco and charas were found.

The muddamal charas was seized under a panchnama, Ex.12, by affixing necessary seal and taking signatures of the Panchas. An offence was registered against the accused by filing a complaint, Ex.11. The muddamal charas was sent to the Forensic Science Laboratory and on the basis of the report of the Forensic Scientific Laboratory that the muddamal seized from the accused is charas, a chargesheet was filed against the accused.

To the charge, Ex.5, levelled against the accused, the accused pleaded not guilty and claimed to be tried. The defence of the accused was of total denial. The learned Additional City Sessions Judge, after considering and appreciating the evidence on record by his impugned judgment and order dated 13-10-1993 convicted the appellant herein and acquitted rest of the accused.

We have gone through the oral evidence led by the prosecution to which our attention was invited by Mrs Banna Datta, learned Advocate appearing for the appellant. Only contention advanced on behalf of the appellant is that prior to th raid, the complainant had not taken down the information in writing that the appellant is engaged in selling charas, nor passed on the said information to his immediate superior officer and thereby has committed breach of the provisions of Section 42 of the NDPS Act and consequently the entire trial is vitiated. Mrs. Datta has fairly stated before us that as far as the merits of the case is concerned, the appellant has no case and she is not in a position to dislodge the reasoning of the learned Additional City Sessions Judge.

Since we have narrated the facts from the deposition of the complainant PI Raol, it is not necessary to renarrate his evidence. In the

cross-examination , the complainant has clearly admitted that he had received the information , however, since no station diary was maintained, he had not entered the information received by him. He has further stated that he thereafter informed his immediate superior Dy.S.P. Sidhraj in his chamber. In view of this evidence, it is clear that the complainant had not taken down the information in writing . Section 42 of the NDPS Act which deals with power of entry, search , seizure an arrest without warrant or authorisation reads as under:

"42. Power of entry, search, seizure and arrest  
without warrant or authorisation.-

(1) Any officer ( being an officer superior in rank to a person, sepoy or constable ) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government or any such officer ( being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may , between sunrise and sunset,-

- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any documenty or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV

relating to such drug or substance; and  
(e) detain and search and, if he thinks  
proper, arrest any person whom he has  
reason to believe to have committed any  
offence punishable under Chapter IV  
relating to such drug or substance;

Provided that if such officer has reason to  
believe that a search warrant or authorisation  
cannot be obtained without affording opportunity  
for the concealment of evidence or facility for  
the escape of an offender, he may enter and  
search such building, conveyance or enclosed  
place at any time between sunset and sunrise  
after recording the grounds of his belief.

(2) Where an officer takes down any information  
in writing under sub-section (1) or records  
grounds for his belief under the proviso thereto,  
he shall forthwith send a copy thereof to his  
immediate official superior."

On plain reading of this section ,it is clear  
that under section 42(1), the empowered officer , if he  
has a prior information given by any person then that  
should necessarily be taken down in writing. But if he  
has reason to believe from personal knowledge that an  
offence under Chapter IV is committed or material which  
may furnish evidence of the commission of such offence is  
kept or concealed in any building, conveyance or enclosed  
place, he may carry out the arrest or search without any  
warrant or authorisation between sunrise and sunset and  
the provision does not mandate that he should record his  
grounds for the said belief. But under the proviso to  
Section 42, if such officer is required to carry out such  
search between sunset and sunrise, he must record the  
grounds of his belief. Under sub-section (2) of Section  
42 of the NDPS Act such empowered officer is required to  
take down any information in writing under Section 42(1)  
or record grounds for his belief under the proviso to  
Section 42(1) and to send forthwith a copy thereof to his  
immediate official superior. It is further clear reading  
the proviso to sub-section (1) of Section 42 that if such  
officer has to carry out search between sunset and  
sunrise, he must record the grounds of his belief. In  
the case on hand, there is no dispute to the fact that  
the arrest as well as search of the accused were carried  
out during day time. Therefore, the provisions of  
section 42(1) whereby the officer who has to carry out  
the search between sunset and sunrise, if he does not  
record the grounds of his belief, to that extent such a

contravention would affect the prosecution case and vitiate the trial as the said provisions are mandatory. However, failure to send information in writing or record grounds of belief under proviso to sub-section (1) of Section 42, as provided in section 42(2), would, in our opinion, though mandatory, the contravention thereof, even though may affect the prosecution case, will not vitiate the trial. We are fortified in our view by the decision of the Supreme Court in State of Punjab vs Balbir Singh AIR 1994 SC 1872 wherein, while recording the conclusions in paragraph 26, it is observed in sub-para (3) thereof as under:

"26. The questions considered above arise frequently before the trial courts. Therefore, we find it necessary to set out our conclusions which are as follows:

(3) Under Section 42(2) such empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case."

In that view of the matter, we find no substance in the contention raised by the learned Advocate for the appellant.

Reverting back to the facts of the case, in our opinion, except the so-called mistake which is technical in nature of not informing the immediate superior officer about the information received, nothing is brought out by the defence in the cross-examination of the complainant PI Raol. The complainant has remained firm in his evidence as far as the search and seizure of material found from the possession of the appellant is concerned, which is found to be charas as per the report of the Forensic Science Laboratory. Although the complainant is a police officer, his evidence, in our opinion, appears to be believable and inspires confidence. We see no reason to discard his evidence. The learned Additional City Sessions Judge has given cogent and convincing reasons by accepting the prosecution case. Suffice it to say that we are in total agreement with the reasoning

given by the learned Additional City Sessions Judge. In that view of the matter, we do not find any substance in this appeal.

In the result, this appeal fails and is dismissed.

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